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April 13, 2016

VIA E-filing

Ms. Laurel Ross
Acting Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Ross:

Re: Project No. 3698854
British Columbia Hydro and Power Authority (BCH)
W.A.C. Bennett Dam Riprap Upgrade Project (Project)
Exhibit A-12, Proposed Regulatory Process

We write on behalf of Saulteau First Nations (SFN) in response to the Commission's request for comments on the draft regulatory timetable options attached to Exhibit A-12.

Oral or Written Hearings

We respectfully submit that SFN's concerns regarding the potential adverse impacts of the Project on SFN's interests and the adequacy of consultation to date would be best addressed through a process with an oral hearing and written submissions. In our view, the significant legal and factual disputes that have arisen in this proceeding warrant both oral and written submissions. That said, a written hearing could represent a reasonable compromise between SFN's interests in receiving a fair hearing and BCH's concerns regarding the Project schedule.

If a choice must be made, SFN prefers a written hearing over an oral hearing because the Project Application has raised complex issues that can be more effectively addressed in writing.[1] The Commission must assess whether BCH has met its constitutional duty to consult SFN with a view to substantially addressing SFN's concerns, and if appropriate, to accommodate SFN's interests.[2] That analysis includes an assessment of the potential adverse impacts of the Project on SFN's Treaty rights

[1] *Black v. Advisory Council for the Order of Canada,* 2012 FC 1234 at para 84.

[2] Order G-51-10.

and interests. We anticipate that to present clear and well-supported submissions on the adequacy of Crown consultation, both BCH and SFN will need to cross-reference BCH's Application with responses to information requests (IRs) and other documentary evidence. In our view, submissions that include a detailed review of the record can be most effectively communicated to the Commission in writing.

We agree with BCH's position that the determination of consultation is a substantive issue that merits full legal argument with respect to an assessment of the overall public interest.[3] Full legal argument in this context requires comprehensive submissions on facts and law, as well as useful references to applicable case law. In this regard, the process should not restrict SFN's procedural right to ensure that its position concerning its constitutionally protected rights is effectively and clearly addressed.

Scope of Information Requests

With regards to the third round of information requests (IR No. 3) tentatively set for Thursday, April 28, we respectfully request a change to the proposed scope. We ask that IR No. 3 not be confined to BCH's April 22 Evidentiary Update.

One of SFN's key concerns on the adequacy of consultation is the responsiveness of BCH's mitigation measures to SFN's interests. We are concerned that if IR No. 3 is restricted to BCH's April 22 Evidentiary Update – the scope of which will be chosen by BCH – SFN's ability to submit IRs pertaining to mitigation measures will be unreasonably limited or excluded.

Moreover, during the first round of IRs, the FNITR and TUS were incomplete. Since then, SFN has worked diligently to ensure that the reports were completed in time for this proceeding. By April 28, all parties will have these reports. The FNITR and TUS may bring to light gaps or deficiencies within BCH's Application materials, and importantly, the reports will improve SFN's capacity to critically evaluate BCH's Application, supporting materials, and other documents on the record. As a result, it is likely that SFN will identify further information that it requires from BCH to understand the potential impacts of the Project on SFN rights and interests and potential solutions.

For these reasons, we request that the following documents are included in scope of IR No. 3: BCH's Application and supporting documents, IR responses, and the consultation record, including engagement with First Nations on mitigation measures. Given the small number of parties to the present proceeding, it is unlikely that BCH or the Commission will be overburdened by the receipt of excessive or voluminous information requests.

[3] Exhibit A-8, Appendix A, Order G-51-16; Transcript Vol. 1, pp. 27-28.

Timetable

With regards to the proposed schedule in Option A attached to Exhibit A-12, we agree with the dates set out by the Commission. With respect to the slight timetable difference between Options A and B, we submit that the potential five day delay caused by Option A is not a significant concern. Throughout this process, BCH has demonstrated that its Project Schedule has some flexibility,[4] and it is reasonable to require BCH to adapt to a five day delay. Our understanding is that BCH requires a Commission decision by mid-May 2016 "so that the Board of Directors can approve Implementation Phase funding by late May 2016".[5] If this is so, BCH could reschedule the meeting or the Board could issue an implementation decision with the caveat that it would be subject to the Commission's decision. Moreover, we submit that SFN's access to a fair hearing should not be minimized because of BCH's previous delays.[6]

Conclusion

SFN requests that the consideration of whether BCH's Application is in the public interest, and whether the Crown has discharged its constitutional duty to consult, be conducted through a combined oral and written hearing process. However, with respect to the options attached to Exhibit A-12, SFN has a preference for a written hearing as proposed by the Commission in Option A, and further requests that IR No. 3 not be limited in scope.

Yours truly,

DONOVAN & COMPANY

p.p. M. Valentine

James Hickling
JH/mav

cc: Tom Loski, Chief Regulatory Officer, BC Hydro
Registered Interveners

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[4] Exhibit B-1, Application, p. 3-23 and Appendix D-1, p. 7-4; and see Exhibit A-8, Appendix A, Order G-51-16, in which the Commission found that "any additional project costs due to delay will be more than offset by a reduction in ratepayer cost recovery".

[5] Exhibit B-1, Application, p. 1-5.

[6] As the Commission noted in Exhibit A-8, Appendix A, Order G-51-16, "it does not appear the Saulteau TUS delay is attributable to the Saulteau"; and in BCH's letter dated March 9, 2016 (Exhibit B-8) BCH requested a delay to the proceedings by 7 days.